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AOR 2005-10

June 24, 2005

The Honorable Scott Thomas
Chairman, Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request

Dear Chairman Thomas:

On behalf of The Honorable Howard L. Berman (CA-28) and The Honorable John T. Doolittle (CA-04) ("Requestors"), we request an advisory opinion from the Federal Election Commission pursuant to 2 U.S.C. § 437f (2005). Requestors seek an opinion as to whether they may freely raise funds for committees that are formed solely to support or oppose initiatives on the November 8, 2005 California statewide special election ballot; and that are neither established, financed, maintained or controlled by persons covered by 2 U.S.C. §§ 441i(a) or 441i(e). Because of the short time between now and the November 8 election, Requestors respectfully request that the Commission consider this request on an expedited basis.

I. INTRODUCTION

Requestors are Members of the United States House of Representatives. Each is a "candidate" as that term is defined and used by 2 U.S.C. § 431(2). Each would engage in the proposed conduct in his individual capacity, and not on behalf of any political party committee. Both are citizens of the State of California.

On June 13, 2005, the Governor of California issued a proclamation ordering a statewide special election, to be held on November 8, 2005. *See* Special Election Proclamation (June 13, 2005). Initiatives on the subjects of abortion, the political use of union dues, teacher tenure, redistricting, and school funding have already qualified

for the ballot. *Id.* Three other initiatives, on the subjects of prescription drug prices and electric service regulation, await verification by the Secretary of State and may also be on the November 8 ballot. Neither Requestors nor any other federal candidate will be on that ballot.

Requestors are intensely interested in these initiatives and want to be active in support or opposition, as the case may be. The initiatives represent major issues facing their constituents and touch on matters frequently before the Congress. Moreover, California has a long history of elected officials being heavily involved in the initiative process. *See, e.g., Citizens to Save California v. California Fair Political Practices Comm'n*, No. 05AS00555 (Cal. Super. Ct. filed Feb. 14, 2005) (Decl. of T. Anthony Quinn), *available at,* HTTP://ELECTIONLAWBLOG.ORG/ARCHIVES/QUINN%20DECLARATION%20OFC.PDF (discussing the role of governors in sponsoring and promoting initiatives).

Indeed, the Governor is now litigating – and thus far has won – a challenge to a Fair Political Practices Commission regulation that would limit the amounts that may be contributed to ballot measure committees controlled by state or local candidates. *See Citizens to Save California v. California Fair Political Practices Comm'n*, No. 05AS00555, slip. op. (Cal. Supr. Ct. Mar. 25, 2005). The trial court held that, even in light of *McConnell v. FEC*, 540 U.S. 93 (2005), the regulation "unreasonably impairs and chills the associational rights of candidates" and thus "is not closely drawn to match the identified governmental purposes." *Citizens to Save California*, slip. op. at 21.

As a result, state candidates and elected officials may freely establish and control committees to affect the outcome of the November 8 initiatives, and may raise unlimited amounts for these committees from corporations, unions and individuals. Requestors do not seek to do the same. Neither they, nor anyone acting on their behalf, would establish, finance, maintain or control such committees, whether directly or indirectly. They are not on the November 8, 2005, ballot. They would not raise funds for any public communications that would refer to them in their respective districts. Requestors would comply with all California laws governing activities involving these committees.

Requestors seek affirmation from the Commission that, under these facts, they may solicit and direct funds freely for ballot initiative committees run independently by others, and seeking solely to affect the November 8 initiatives.

II. LEGAL DISCUSSION

A. Statutory Framework

The Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431, *et seq.* (the "Act" or "FECA"), does not prohibit Members of Congress and Federal candidates from raising any funds outside its limits or restrictions. Rather, it curtails their fundraising activities only "in connection with" elections. 2 U.S.C. § 441i(e)(1). For example, Members may freely raise funds outside the Act's source restrictions for legal defense funds, because such fundraising is not "in connection with" an election, even when the litigation results from an election in which the Member ran. *See* Advisory Opinion 2003-15 (issued to Rep. Majette).

A person covered by § 441i(e)(1) may not "solicit, receive, direct, transfer, or spend funds in connection with an election for federal office, including funds for any federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of" the Act. *Id.* § 441i (e)(1)(A). A covered person may not engage in this same conduct "in connection with any election other than an election for federal office," nor may he or she disburse funds in connection with such an election, unless the funds do not exceed the contribution limits that would apply to federal candidates or political committees, and do not come from federally prohibited sources. *Id.* § 441i(e)(1)(B).

"Neither the Act nor Commission regulations define which elections are covered by" § 441i(e)(1)(B). Advisory Opinion 2003-12. The definition of "election" at 2 U.S.C. § 431(1) "does not resolve the question as to whether a state ballot measure is an election other than an election for federal office for purposes of" § 441i(e)(1)(B). Advisory Opinion 2003-12.

B. Application of § 441i(e)(1)(B)

The central question to be answered by the Commission in response to this request is whether the November 8 initiatives represent an "election other than an election for federal office" and trigger application of the § 441i(e)(1)(B) restrictions. Because Requestors propose to raise funds solely to support or oppose the November 8 initiatives, and not for any Federal election activity, the restrictions of § 441i(e)(1)(A) should not apply.

The Commission has never applied § 441i(e)(1)(B) to fundraising by a covered person for an independent ballot initiative committee. The weight of authority suggests that such fundraising does not trigger § 441i(e)(1)(B). It further suggests that the decisive factor in triggering § 441i(e)(1)(B) is whether the committee has been established, financed, maintained or controlled by a covered person.

1. Advisory Opinion 2003-12

In Advisory Opinion 2003-12, the Commission considered the situation of the Stop Taxpayer Money for Politicians Committee ("STMP"). This committee was formed and chaired by Congressman Flake, was staffed by his agents, and proposed to share staff and facilities with his campaign. It proposed to sponsor electioneering communications featuring him, produced by a media firm he helped choose, from scripts he helped write. It proposed to conduct extensive Federal election activity in an election in which he was on the ballot.

From these facts, the Commission held that STMP's activities, other than its Federal election activity and electioneering communications, were covered by § 441i(e)(1)(B)'s restrictions. Advisory Opinion 2003-12. The deciding factor for the Commission in applying § 441i(e)(1)(B) was the fact that Congressman Flake had established, financed, maintained and controlled STMP:

> because STMP is an entity "established, financed, maintained and controlled" by Representative Flake, the activities of STMP as described in your request . . . are in connection with an election other than an election for Federal office, and thus within the scope of 2 U.S.C. § 441i(e)(1)(B).

Advisory Opinion 2003-12.

In dicta not responsive to Congressman Flake's or STMP's request, the Commission opined that the prequalification activities of a ballot initiative committee not established, financed, maintained or controlled by a covered person are not "in connection with" an election and is not subject to the § 441i(e)(1)(B) restrictions. *See* Advisory Opinion 2003-12. The Commission did not accept the premise that because § 441i(e)(1)(B) refers broadly to "any election," all fundraising for ballot initiative committees are thus subject to that statute's restrictions. Significantly, it declined to adopt language in a draft opinion that would have applied § 441i(e)(1)(B) generally to

both pre-and post-qualification fundraising. *See* Agenda Doc. No. 03-46, "Draft A," at 7-9

In the final advisory opinion, the Commission seemed to distinguish between pre- and post-qualification activities:

> On the other hand, the Commission concludes that the activities of a ballot measure committee that is not "established, financed, maintained or controlled" by a Federal candidate, officeholder, or agent of either, are not "in connection with any election other than an election for Federal office" prior to the committee qualifying an initiative or ballot measure for the ballot, but are "in connection with any election other than an election for Federal office" after the committee qualifies an initiative or ballot measure for the ballot.

Advisory Opinion 2003-12. This apparent distinction relied on the presumed proximity of post-qualification activity to federal elections, and the presumed likelihood that Federal election activity would result. "There is a clear delineation between pre-ballot qualification activities, such as petition and signature gathering, which do not occur within close proximity to an election, and post-ballot qualification activities, that occur in closer proximity to elections and potentially involve greater amounts of Federal election activity." *Id.*

Nonetheless, it was the relationship between Congressman Flake and the committee that rendered STMP's activities "in connection with an election other than an election for Federal office, and thus within the scope of 2 U.S.C. 441i(e)(1)(B)." *Id.* Some who commented on Advisory Opinion 2003-12 acknowledged that this relationship was the decisive variable:

> ***FECA and BCRA generally do not impact the activities of a ballot initiative and ballot referenda committee, so long as the committee is not established, financed, maintained or controlled by a federal candidate or officeholder.*** Thus, ballot initiative committees and federal officeholders retain a broad zone within which they are free to independently promote ballot issues however they see fit.

See Letter from Lawrence Noble, Center for Responsive Politics, and Paul Sanford, FEC Watch, to Lawrence H. Norton (Apr. 21, 2003) (emphasis added). "The limitations on the ability of a federal candidate to raise funds for or otherwise support a completely independent ballot initiative committee is beyond the scope of this

AOR." Letter from Adam H. Morse, Assoc. Counsel, Brennan Center for Justice, to Rosemary C. Smith, Esq. (Apr. 21, 2003).

The statute does not restrict an officeholder's involvement with any committee active in any "election," but only with those committees whose activities implicate the purposes of the FECA. The Commission has found those purposes to be implicated where a committee's spending would affect a candidate's own election – such as where an initiative shares the ballot with a federal election, or where the candidate or officeholder controls the committee raising and spending soft money. Where there is neither potential effect on the officeholder's election, nor any control by the candidate, there is no basis for prohibiting an officeholder's support for a ballot initiative committee.

2. Application of analogous statutes

By looking to whether a covered person had established, financed, maintained or controlled in applying § 441i(e)(1)(B), the Commission echoed the manner in which it had applied analogous statutes to pre-BCRA conduct. The Commission consistently distinguished "ballot referenda issues" from "elections to any political office" governed by §§ 441b and 441e. *See* Advisory Opinion 1980-95; *accord* Advisory Opinion 1984-62 n. 2; Advisory Opinion 1982-10. The Commission departed from that approach only when a candidate for state office proposed to establish a ballot initiative committee controlled by him, bearing his name, and seeking votes in an election in which he was on the ballot. *See* Advisory Opinion 1989-32. In that case, the Commission held that § 441e prohibited the committee from raising funds from foreign nationals lacking permanent resident status.

This approach was similar to that taken by the Internal Revenue Service, which requires a nexus between a ballot initiative and candidate support in order to treat initiative activity under Section 527 of the Internal Revenue Code. The Code defines an "exempt function" under Section 527 as

> the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

26 U.S.C. § 527(e)(2). "Generally, expenditures made in connection with ballot measures, referenda, or initiatives are not section 527 exempt function expenditures." Priv. Ltr. Rul. 99-25-051 (June 25, 1999). "[S]uch expenditures will be considered for an exempt function where it can be demonstrated that such expenditures were part of a deliberate and integrated political campaign strategy to influence the election for state and local officials by making active use of ballot measures, referenda, and initiative campaigns." *Id.*

The language of § 441i(e)(1)(B) is different from that of § 441b, § 441e and 26 U.S.C. § 527. Nonetheless, the approaches taken both by the Commission and the IRS in interpreting these other statutes are suggestive. They indicate that ballot initiative activity is not normally treated as an election of any sort; and that an exception is made only when there is a strong nexus between the activity and the support of specific candidates.

III. CONCLUSION

For the foregoing reasons, Requestors respectfully request an advisory opinion approving the proposed activity.

Very truly yours,

Judith L. Corley
Brian G. Svoboda
On behalf of Requestors

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07/15/2005 03:26 PM

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cc "Corley, Judy" <JCorley@perkinscoie.com>
Subject Berman/Doolittle AOR

Brad, per our telephone conversation:

* Requestors understand, as the Commission does, that the qualification deadline for the special election ballot has passed. Accordingly, they do not seek advice on prequalification fundraising.

* For purposes of this request, Requestors do not propose to raise funds for any organization affiliated with, or directly or indirectly established, financed, maintained or controlled by, a state, district or local committee of a political party.